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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CHINA UNION LINES, LTD.,
Petitioner,

– versus –

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, *et al.*,
Respondents,

and

LAN JING-CHAU, *et al.*,
Petitioners,

– versus –

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, *et al.*,
Respondents.

RESPONDENT AMERICAN CYANAMID COMPANY'S BRIEF IN OPPOSITION

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Statement of the Case

We are unable to accept Petitioners' statements of the case.

Acrylonitrile is a liquid petro chemical which has been manufactured in this Country since 1940. It is inflammable; its vapor, within certain limits of density, is explosive; and its fumes are toxic, as are those

of most petroleum derivatives. Inhalation of acrylonitrile vapors will cause headaches and nausea, but will not leave any aftereffects. From 1940 at least until this cargo was laden on the "Berean" at Good Hope, Louisiana, in November, 1961, there were no known deaths from the industrial use of acrylonitrile (Tr. 2049-50).

At the time of the collision acrylonitrile was classified by the United States Coast Guard as an inflammable liquid (46 CFR §146.21-100, p. 148), as are such common substances as anti-freeze preparations, cigar and cigarette lighter fluid, coal tar derivatives, lacquer, paint and varnish, crude oil, gasoline and road asphalt (46 CFR, revised as of January 1, 1966, §146.21-100, pp. 170-312). The United States Coast Guard has not classified acrylonitrile as an explosive, a Class A "extremely dangerous poison", a Class B "less dangerous poison", or a Class C "irritating substance" (46 CFR, revised as of January 1, 1966, §146.25, pp. 608-713).

Since the collision, the United States Coast Guard has revised its list of dangerous commodities on at least four occasions:

> Code of Federal Regulations, revised as of January 1, 1964 (46 CFR §146.21-100, p. 172 and §146.25-100, §146.25-200, pp. 594-693).
>
> Code of Federal Regulations, Supplement of July 1, 1964 (46 CFR §146.21-100, p. 20 and §146.25-200, pp. 220-257).
>
> Federal Register, December 22, 1964 (Vol. 29, No. 248, pp. 18163-18169).
>
> Code of Federal Regulations, revised as of January 1, 1966 (46 CFR §146.21-100, p. 172).

Acrylonitrile is still classified by the United States Coast Guard merely as an inflammable liquid. The Interstate Commerce Commission also classifies acrylonitrile merely as an inflammable liquid (49 CFR, revised as of January 1, 1966, §72.5, p. 7). As such there are no restrictions upon the type of tank or the location of the tank in which it may be carried on board a tank vessel. Only in the event that the United States Coast Guard classifies a cargo as an inflammable or combustible liquid having lethal characteristics, i.e. designated as a Class B or Class C poison, must the cargo be carried in tanks which are independent of the vessel's hull structure or separated from the skin of the ship by cofferdams, double bottoms or similar void spaces (46 CFR §39.01-1, §39.05-1). Section 39.05-10 provides that:

> "Cargo tanks independent of the hull shall be installed with a clearance of not less than 24 inches from the vessel's sides".

Although the above regulation does provide for additional precautions when carrying inflammable or combustible liquid having lethal characteristics, this regulation was not designed to protect the escape of such cargo following a collision. In the case herein the bow of the "Union Reliance" penetrated "substantially through the tank in which the chemical was stowed". (Opinion Ct. of Appeals, China Union Lines Appendix A, p. 42).

China Union Lines, Ltd. produced one witness, Heinrich Brieger, who attempted to give the impression during direct examination that had the United States Coast Guard conducted tests it should have classified acrylonitrile as a Class B poison. He

did state during direct examination "that is my opinion * * * but I have no proof of it" (Tr. 2057). This witness was unaware that the United States Government had classified acrylonitrile and categorized it merely as an inflammable liquid. When so advised during cross-examination (Tr. 2151-2152) Mr. Brieger finally stated "I cannot" testify that acrylonitrile should be classified as a Class B poison, "I hesitate very much to say" (Tr. 2156). Furthermore, Brieger never testified, as the Petitioners aver, that acrylonitrile was more "lethally dangerous" or more "deadly" than a five percent solution of hydro-cyanic acid (Tr. 2107-2113). The Court of Appeals for the Fifth Circuit categorized this witness' testimony as follows:

> "The printed record of this witness' testimony presents a portrait of considerable doubt on his part as to whether the Coast Guard, in fact, wrongfully classified the chemical. *In its final analysis, this witness' testimony does not require a finding that Cyanamid knew, or by the exercise of reasonable diligence should have known, that the Coast Guard classification of the chemical was in error.*" (emphasis added) (China Union Lines, Appendix A, p. 41)

Contrary to the inference in the briefs submitted by Petitioners, no one testified that it was a common practice or custom to carry acrylonitrile in center tanks or in tanks separated from the skin of the ship by a cofferdam.

As a result of the collision the cargo of acrylonitrile which was laden in the #1 port wing tank of the

"Berean" caught fire and the fire spread to the foredeck of the "Union Reliance". The members of the crew of the "Berean" attempted to bring the fire on the "Berean" under control and were joined by a fire boat and some fifty United States Coast Guard Officers and enlisted personnel (Tr. 2300). The fire on the "Berean" was contained and extinguished in a matter of hours. Although these men fought the fire at the hatch from which the acrylonitrile was escaping, without face masks or breathing apparatus, none of the officers or crew members of the M/V "Berean" sustained any injuries (Tr. 5025); none of the Coast Guard Officers or enlisted men (Tr. 2301) nor any of the crew of the fire boat were injured (Opinion Court of Appeals, China Union Lines, Appendix A, p. 37). The master of the "Union Reliance" jumped overboard and was later rescued by those in the ship's life boat. He was burned but he did not suffer any ill effects from the acrylonitrile (Tr. 1557-1560). Eleven members of the fifty-one man crew of the "Union Reliance" perished. The District Court specifically found that the deaths did not result from any toxic effect of acrylonitrile but were caused as a result of the fire (Finding of Fact 27, China Union, Appendix D, p. 16). The Court of Appeals specifically affirmed this Finding, stating:

> "Any other finding by the judge, on the record before him, would be based on pure speculation and guess work." (China Union Lines, Appendix A, p. 39)

The Court of Appeals further said:

> "Aside from everything else, it would appear that the proximate cause of death of and injuries to

the seamen, and for that matter all other damages, was not the inherent nature of acrylonitrile, nor any lack of care in its manufacture, nor in giving notice of its toxic or poisonous qualities, nor its stowage location on the ship, but was the unanticipated wrongful action of the RELIANCE in crossing to the wrong side of the channel and propelling its ax like bow against, and substantially through the tank in which the chemical was stowed." (China Union Lines, Appendix A, p. 42)

The Position of Petitioners, Lan Jing-Chau, et al.

The Trial Court concluded that China Union Lines, Ltd. is responsible to the legal representatives or next of kin of the members of the crew of the "Union Reliance" who were killed as a result of the collision and subsequent fire, and was also liable to those members of the crew of the "Union Reliance" who received personal injuries, subject only to a reduction in the percentage of recovery by reason of their own negligent conduct. An Interlocutory Decree was entered so providing. The Court of Appeals for the Fifth Circuit affirmed. Accordingly, Petitioners Lan Jing-Chau, et al., are entitled to recover the full amount of their provable damages from the Petitioner China Union Lines, Ltd.

The Questions Presented for Review

We take exception to the questions presented for review as formulated by Petitioners, at least insofar as they apply to American Cyanamid Company. The

Trial Court found as a matter of fact that the cargo of acrylonitrile was loaded on board the "Berean" in a careful and prudent manner (Finding of Fact 40, China Union Lines, Appendix D, p. 23). The Court of Appeals affirmed. Neither the Trial Court nor the Court of Appeals accepted Petitioners' contention that the Coast Guard improperly classified acrylonitrile. The questions for review as formulated by Petitioners presuppose facts which do not exist; factual contentions which were thoroughly considered and rejected by the Trial Court and the Court of Appeals.

We respectfully submit that under the criteria established by Rule 19 the case does not warrant review by this Honorable Court. The Court of Appeals for the Fifth Circuit has not rendered a decision in conflict with a decision of another Court of Appeals on the same matter; it has not decided an important legal issue of Federal Law which has not been but should be settled by this Court; it has not decided a Federal question in a way in conflict with the applicable decisions of this Court, nor has it departed from the accepted and usual course of judicial proceedings. Petitioners are requesting this Court to review factual issues which have been decided adversely to their interests by the Trial Court and by the Court of Appeals for the Fifth Circuit.

Conclusion

The Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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